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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
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12
13 JAMES ANDRE BLACK,
14 Petitioner,
15 v.
16 CYNTHIA ENTZEL,
17 Respondent.
18

Case No. EDCV 17-1158 MWF (MRW)

**ORDER DISMISSING ACTION
WITHOUT PREJUDICE**

19 This is a habeas action brought by a federal prisoner. Petitioner claims he is
20 entitled to sentence credits for time served in state custody before the start of his
21 federal sentence.

22 However, Petitioner failed to properly present or exhaust his claim
23 administratively within the Bureau of Prisons before commencing the federal
24 action. For this reason, the Court dismisses the action without prejudice.

25 **FACTS AND PROCEDURAL BACKGROUND**

26 Petitioner is serving a 300-month federal prison term for bank robbery and
27 assault. At the time of his federal sentencing in 2007, Petitioner was serving a
28 state term of imprisonment. (Docket # 10 at 4.) The federal sentencing judge

1 expressly stated that Petitioner's federal sentence was to be "served consecutive to
2 the undischarged state term of imprisonment." (Id.)

3 Beginning in late 2016, Petitioner filed requests with personnel at FCI
4 Victorville to recalculate his sentence and give him credit for time served in state
5 custody before beginning his consecutive federal sentence. After a staff member
6 denied relief, Petitioner received a similar denial of his request from the warden of
7 the institution in January 2017. (Docket # 10-1 at 14, 16.)¹

8 Petitioner appealed the decision to the BOP's Western Regional Office
9 (first-level appeal). That office rejected the appeal because Petitioner failed to
10 provide copies of the underlying administrative request and the warden's decision.
11 The regional office also rejected the appeal because it was untimely (not received
12 within 20 days of the warden's decision) and without explanation for the delay.
13 (Docket # 10-1 at 18.) Petitioner never resubmitted his first-level appeal. He also
14 never sought a second-level administrative appeal to the BOP's General Counsel in
15 Washington, D.C. (Docket # 10 at 3.)

16 Instead, Petitioner filed this petition for relief pursuant to 28 U.S.C. § 2241.
17 The petition seeks an order from the Court directing the BOP to credit him for the
18 time served in state custody. (Docket # 1 at 3.) The government moved to dismiss
19 the action due to Petitioner's failure to exhaust his administrative remedies before
20 initiating habeas review in federal court. The government argues that Petitioner
21 still is entitled (and required) to pursue his first- and second-level administrative
22 appeals. (Docket # 10 at 8-10.)

23 Petitioner claims that he filed his first-level appeal on time. Based on the
24 BOP's rejection of the appeal, he contends that further administrative appeals
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26 ¹ The thrust of the adverse decisions was that the time Petitioner served
27 in state custody was credited against his state sentence. The BOP staff concluded
28 that Petitioner could not get "double credit" for this time against his federal
sentence too. (Docket # 10-1 at 14); 18 U.S.C. § 3585(b).

1 would be futile, so this Court may consider the merits of his claim. (Docket # 12
2 at 2.)

3 **DISCUSSION**

4 **Applicable Law**

5 The BOP has administrative procedures for federal prisoners “to seek formal
6 review of an issue relating to any aspect of his/her own confinement.” 28 C.F.R.
7 § 542.10-19 (2012); Martinez v. Roberts, 804 F.2d 570, 571 (9th Cir. 1986). The
8 regulations require an inmate to appeal an adverse administrative decision to the
9 Regional Director of the BOP “within 20 calendar days of the date the Warden
10 signed the response.” 28 C.F.R. § 542.15. An inmate “who is not satisfied with
11 the Regional Director’s response” may appeal to the BOP’s General Counsel. That
12 appeal is “the final administrative appeal.” Id. The regulatory time limits can be
13 extended when the inmate demonstrates a valid reason for delay. Id. Valid
14 reasons include circumstances that prevented the inmate from filing on time.
15 28 C.F.R. § 542.14(b).

16 Federal prisoners generally must exhaust their administrative remedies
17 before filing a federal habeas petition under 28 U.S.C. § 2241. Martinez, 804 F.2d
18 at 571; Jiau v. Poole, 590 F. App’x 689, 690 (9th Cir. 2015). Because exhaustion
19 is not a jurisdictional requirement, the district court has discretion to dismiss an
20 unexhausted § 2241 petition without prejudice, or excuse the requirement and
21 reach the merits. Jiau, 590 F. App’x at 690; Pavlovich v. Johnson, No. CV 16-749
22 PSG (SS), 2016 WL 3410195 at *2 (C.D. Cal. 2016).

23 Typically, though, a court’s discretion to excuse the failure to exhaust is
24 limited to situations where administrative remedies are inadequate or ineffective,
25 pursuing them would be futile, or irreparable injury would result. Pavlovich, 2016
26 WL 3410195 at *2; Laing v. Ashcroft, 370 F.3d 994, 1000-01 (9th Cir. 2004). One
27 key consideration is whether “relaxation of the requirement would encourage the
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1 deliberate bypass of the administrative scheme.” Laing, 370 F.3d at 1000 (citation
2 omitted).

3 **Analysis**

4 Petitioner concedes that his claim is unexhausted. (Docket # 12 at 1.) He
5 asks that his failure to exhaust his claim “be excused because the administrative
6 remedy was effectively unavailable” to him. (Id. at 2.)

7 Petitioner’s request is without merit. He doesn’t deny that he failed to
8 properly present the materials underlying his claim to the BOP regional office. He
9 does deny that his claim was untimely, but he doesn’t explain why he took no steps
10 to correct the BOP’s conclusion or (if his appeal actually was late) to demonstrate
11 why he was unable to file his request on time. He also did not pursue his claim to
12 a second-level appeal with the BOP’s national office. As a result, the failure to
13 exhaust his claim falls squarely in Petitioner’s lap.

14 Importantly, the government’s submission in this Court strongly suggests
15 that he may still avail himself of the administrative review process. The
16 government states that, should Petitioner re-submit a proper request to the BOP’s
17 regional office, the BOP wishes to “be provided with a full opportunity to consider
18 Petitioner’s request before he turns to this Court for relief.” (Docket # 10 at 10.)
19 That appears to conform to the federal regulations that allow Petitioner to re-
20 submit his appeal (with adequate supporting documents) and demonstrate a valid
21 reason for the delay. 28 C.F.R. §§ 542.14(b), 542.15. Petitioner can also file an
22 appeal to the Office of General Counsel.² 28 C.F.R. § 542.15.

23 The Court concludes that the petition is subject to dismissal due to lack of
24 exhaustion. Martinez, 804 F.2d at 571; Jiau, 590 F. App’x at 690; 28 C.F.R.
25 § 542.15. Further, the Court declines to exercise its discretion to excuse

26 ² Regardless of the forum, the BOP should closely examine Petitioner’s
27 contention that he submitted his original appeal to the regional office on
28 January 12, but that it was not received until February 3, 2017. (Docket # 12 at 2,
attachment.)


1 Petitioner's failure to exhaust. Petitioner offers no proof that pursuing an
2 additional administrative appeal would be futile or that the agency's administrative
3 process is inadequate. Under the circumstances, the Court will not allow Petitioner
4 to "bypass" the administrative exhaustion process here. Laing, 370 F.3d
5 at 1000-01.

6 **CONCLUSION**


7 The Court concludes that Petitioner failed to properly exhaust his
8 administrative remedies before filing this action. The government's motion to
9 dismiss is GRANTED. The action is DISMISSED without prejudice.

10 IT IS SO ORDERED.

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13 Dated: October 2, 2017

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16 HON. MICHAEL W. FITZGERALD
17 UNITED STATES DISTRICT JUDGE

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19 Presented by:

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22 HON. MICHAEL R. WILNER
23 UNITED STATES MAGISTRATE JUDGE
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